87-1986

Supreme Court, U.S.
FILED
JUN 3 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-___

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

UNITED STATES OF AMERICA,
Respondent,

v.

RICHARD LEE COLZIE,
Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

WILLIAM B. MOFFITT
LISA BONDAREFF KEMLER
WILLIAM B. MOFFITT & ASSOCIATES
655 South Washington Street
Alexandria, Virginia 22314
(703) 684-7900
Counsel for Petitioner

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE FOURTH CIRCUIT COURT OF APPEALS MAY OVERRULE A DISTRICT COURT'S PRE-TRIAL PROBABLE CAUSE DETERMINATION WITHOUT FINDING THAT THE DISTRICT COURT'S FINDINGS OF FACT WERE CLEARLY ERRONEOUS.

II. ASSUMING ARGUENDO THAT PROBABLE CAUSE DETERMINATIONS ARE A MIXED QUESTION OF LAW AND FACT SUBJECT TO A "DE NOVO" STANDARD OF REVIEW, THAT STANDARD OF REVIEW REQUIRES APPLICATION OF THE CLEARLY ERRONEOUS STANDARD OF REVIEW TO THE DISTRICT COURT'S FACTUAL FINDINGS.

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OPINION BELOW

On April 6, 1988, the United States Court of Appeals for the Fourth Circuit, in an unpublished per curiam opinion, No. 87-5147, affirmed the petitioner's conviction for the reason set forth in its prior unpublished per curiam opinion of April 20, 1987, No. 85-5254 (App. A). [1] On April 20, 1987, the court of appeals reversed the order of the district court granting the petitioner's suppression motion, and remanded the case for trial. (App. B).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

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[1] "App." refers to the Appendix that follows this Petition. "J.A." cites refer to the Joint Appendix prepared by counsel below in accordance with Rule 10, Fed. R. App. Pro. and the Fourth Circuit Rules.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment provides, in pertiment part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * *."

The Fourteenth Amendment provides, in pertinent part: "No State shall * * * deprive any person of life, liberty, or property, without due process of law * * *."

STATEMENT

Following a bench trial on stipulated facts on June 19, 1987, in the United States District Court for the Eastern District of Virginia, Alexandria Division, petitioner was convicted of possession with intent to distribute cocaine in violation of 28 U.S.C. Sec. 841(a)(1).

On October 18, 1985, a suppression hearing was held before Judge Albert V. Bryan, Jr., United States District Court for the Eastern District of Virginia, Alexandria Division. Testimony at the suppression hearing revealed the following:

On September 4, 1985, at Washington National Airport, Agent John Lee of the Drug Enforcement Administration ("DEA"), observed petitioner deplane a flight from

Miami. (J.A. 9). Petitioner was wearing a suit, but no socks, carried no luggage and met with a white male. (J.A. 9-10). Apparently these few circumstances were sufficient to draw Agent Lee's attention, however, he decided not to approach petitioner at that time. (J.A. 10).

On September 5, 1985, at Washington National Airport, Agent Lee observed petitioner deplane a flight from Miami, although, unlike the day before, petitioner was wearing casual clothes and carried a carry-on bag. (J.A. 21). Agent Lee also observed that an individual (co-defendant Welch) who had deplaned approximately six to ten passengers behind petitioner eventually caught up with petitioner and walked with him through the terminal. (J.A. 22-23). There was no indication that petitioner

and Mr. Welch were attempting to conceal the fact that they were traveling together. However, whether they were in fact traveling together was only an assumption on Agent Lee's part. (J.A. 24). Petitioner met againt with the white male, later identified as Lou Scandal, whom he had met with on the previous day. (J.A. 9).

Agent Lee and Agent McKarin, also of the DEA, approached petitioner, Mr. Welch and Mr. Scandal from behind. While petitioner and Mr. Welch stopped, Mr. Scandal continued to walk and, in fact, walked out of the terminal. After showing his credentials to petitioner and advising petitioner that he was with the DEA as part of a drug interdiction team, whose purpose was to check individuals whom they thought were carrying drugs,

Agent Lee stated that he and Agent McKarin wanted to talk to him. (J.A. 27-28).

Agent Lee then asked Mr. Welch what his name was and Mr. Welch responded with a name other than that which appeared on his ticket. (J.A. 13, 31, 46). Petitioner, on the other hand, did not give a false name when he was asked. (J.A. 32). Petitioner testified that, by this time, Agent McKarin had taken his ticket as well as his wallet.

Twice, Agent Lee asked petitioner and Mr. Welch whether they were carrying anything in their bags. (J.A. 13-14). Agent Lee testified that when asked if it would be alright to look through their bags, both petitioner and Mr. Welch responded affirmatively. (J.A. 14-15). Upon finding cocaine in an Efferdent box

in Mr. Welch's bag and placing him under arrest, Agent Lee then asked petitioner whether he and Mr. Welch were traveling together. When petitioner stated that they were traveling together, Agent Lee arrested him as well. (J.A. 15).

Petitioner testified that after Agent Lee had arrested him, Agent McKarin, at Agent Lee's direction, searched him and started to search his bag. (J.A. 52). Petitioner testified that he never consented to the search of his bag. Agent McKarin found no contraband in the petitioner's bag. (J.A. 38). It was not until petitioner's bag was searched again in the FAA Police Department that cocaine was found in his bag. (J.A. 38).

The district court granted petitioner's motion to suppress, finding that there existed no probable cause for the petitioner's arrest.

The United States appealed the district court's order granting the petitioner's motion to suppress to the Court of Appeals for the Fourth Circuit. On November 14, 1986, the Fourth Circuit remanded the case to the district court with instructions that it make a finding of fact on the issue of whether the appellant had consented to the search of his luggage. United States v. Colzie, No. 85-5254. (App. C). On November 25, 1986, the district court entered a Memorandum Opinion and Supplemental Finding in which it found that petitioner had not consented to the search of his luggage. The United States appealed from the district court's Memorandum Opinion and Supplemental Finding and, on April 20, 1987, the Fourth Circuit reversed the district court's order granting the

motion to suppress and remanded the case for trial. The Fourth Circuit denied petitioner's motion for rehearing with a suggestion for rehearing en banc on May 22, 1987. (App. D).

After the petitioner's conviction from a bench trial on stipulated facts, on April 6, 1988, the Fourth Circuit affirmed the petitioner's conviction pursuant to petitioner's motion to rescind briefing schedule and to affirm prior ruling.

ARGUMENTS

I. WHETHER THE FOURTH CIRCUIT COURT OF APPEALS MAY OVERRULE A DISTRICT COURT'S PRE-TRIAL PROBABLE CAUSE DETERMINATION WITHOUT FINDING THAT THE DISTRICT COURT'S FINDINGS OF FACT WERE CLEARLY ERRONEOUS.

The District Court conducted an evidentiary hearing on the petitioner's motion to suppress. After hearing the testimony and observing the demeanor of the arresting officer and the petitioner, the court of appeals concluded that there existed no probable cause to arrest the petitioner. The Fourth Circuit subsequently reversed the judgment of the district court without finding that the trial court's factual determinations were clearly erroneous. In its opinion, the Court of Appeals stated:

> While the district court was aware of the other facts relied upon by the government to establish probable cause, it

> did not think that they amounted to such a showing. We think otherwise.

United States v. Colzie, No. 85-5254, Slip Op. at 8 (4th Cir. April 20, 1987) (App. B). (Emphasis added). The court of appeals proceeds to discuss four separate factual events which in its opinion established probable cause for an arrest. Acting in the absence of a determination that the district court's factual findings were clearly erroneous, the court of appeals made an independent determination that probable cause did exist for the arrest of petitioner. This independent determination was totally fact bound.

In reversing, the Fourth Circuit relied on two cases to support its opinion, United States v. Howard, 758 F.2d 1318 (9th Cir. 1985) and United

States v. Pepple, 707 F.2d 261 (6th Cir. 1983). Both cases involved appeals of a defendant from a district court finding that probable cause to arrest existed. Significantly, each court, in making that determination, applied a different standard of review. In Pepple, supra, the Sixth Circuit applied the "clearly erroneous" standard of review.[2] The Ninth Circuit Howard opinion, however, applied that circuit's newly declared "de novo" review for such cases. [3] These cases illustrate a growing split in the circuits regarding what is the appropriate standard of review to be utilized by an appellate court in evaluating a district court's factual findings regarding probable cause.

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[2]707 F.2d at 263.
[3]758 F.2d at 1319.

The first, second, third, fifth, eleventh and D.C. circuits have all held that findings of fact by the district court must be reviewed under the "clearly erroneous" standard. [4]

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[4]See United States v. Veillette, 778 F.2d 899 (1st Cir. 1985); United States v. Harris, 507 F.2d 197 (3rd Cir. 1975); United States v. Maldonado, 735 F.2d 809 (5th Cir. 1985); United States v. Lawson, 809 F.2d 1514 (11th Cir. 1987); and United States v. Hinckley, 672 F.2d 115 (D.C.Cir. 1982).

See also Fed. Rules Civ. Proc. Fule 52(a), 28 U.S.C.A.

Similarly circuits have held that determinations of probable cause for a warrant made by a magistrate must be reviewed under the "clearly erroneous" standard. While petitioner acknowledges that these determinations of probable cause are made by an officer of the court rather than by a police officer at the scene, it is important to note that deference is given to a district court when it undertakes to evaluate the facts surrounding a determination of probable cause. See generally, United States v. Phillips, 727 F.2d 392 (5th Cir. 1984); United States v. Sevier, 539 F.2d 599 (6th Cir. 1976); United States ex rel. Placek v. State of Illinois, 546 F.2d 1298 (7th Cir. 1976).

These circuits are unanimous in the view that it is not the function of an appellate court to sit as de novo fact finder.

The Maldonado case from the Fifth Circuit is illustrative of the rationale for applying the clearly erroneous standard to a district court's factual findings with respect to a motion to suppress:

> In reviewing a trial court's ruling on a motion to suppress based on live testimony at a suppression hearing, the trial court's purely factual findings must be accepted unless clearly erroneous, or influenced by an incorrect view of the law, and the evidence must be viewed in the light most favorable to the party prevailing below, except where such a view is either not consistent with the trial court's findings or is clearly erroneous considering the evidence as a whole.

Maldonado, supra, 735 F.2d at 814.

This Court has also considered this issue and has held that an appellate court may overrule a district court's findings of fact only if they are clearly erroneous. See Pullman-Standard v. Swint, 456 U.S. 273, 287, 102 S.Ct. 1781, 1789 (1982). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Co., 333 U.S. 364, 395, 68 S.Ct. 525, 542 (1948). See also Pepple, supra, at 263; United States v. Clark, 754 F.2d 789, 791 (8th Cir. 1985); United States v. Alonso, 790 F.2d 1489, 1496 (10th Cir. 1986). Thus, in these circuits, an appellate court may only reverse a district court's finding

of whether probable cause did or did not exist if it concludes that such finding was "clearly erroneous."

Two circuits, the Seventh and the Ninth, have held that an appellate court may undertake a de novo review of a district court's finding of probable cause. See United States v. Lima, 819 F.2d 687 (7th Cir. 1987); United States v. Pinion, 800 F.2d 976 (9th Cir. 1986); Howard, supra.[5] In so ruling, the Seventh and Ninth Circuits have held that the determination of probable cause is a

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[5] Both the Seventh and Ninth Circuits altered their standard of review regarding review of probable cause determinations without overruling prior circuit precedent. See United States v. $73,277, United States Currency, 710 F.2d 283, 288 (7th Cir. 1983), United States v. Vanichromanee, 742 F.2d 340 , 346 (7th Cir. 1984), United States v. Doe, 787 F.2d 1290, 1292 (9th Cir. 1985), United States v. Coletta, 682 F.2d 820, 825 (9th Cir. 1982), United States v. Franco, 638 F.2d 1206, 1208 (9th Cir. 1980).

mixed question of fact and law and, therefore, the determination can be reviewed de novo on appeal. However, for purposes of review, appellate courts must still rely on the district court's factual findings unless they are clearly erroneous. Thus even under the Lima and Pinion decisions, the Seventh and Ninth Circuit limit this "de novo" review to a review of the district court's final determination of probable cause. Lima, supra, at 688; Pinion, supra, at 979.

The Fourth Circuit's reliance on Pepple, supra, to reverse the district court is particularly ironic in light of the Sixth Circuit's affirmative recognition of the deference to be accorded the trial court's factual determinations in such matters:

Labeling the determination of probable cause as an 'ultimate' finding does not detract from its factual nature - other equally 'ultimate' findings are tested under the clearly erroneous rule.

* * *

The existence of probable cause depends on the particular facts of each case and often hinges a great deal on the credibility of witnesses. In addition to the trial court's opportunity to assess the credibility of witnesses, application of the clearly erroneous standard reflects and preserves the proper relationship between trial courts and courts of appeal.

Pepple, 707 F.2d at 263 (citations ommitted). (Emphasis added).[6]

The Fourth Circuit opinion reflects no such deference to the trial court's assessment of an of the facts which the trial court utilized in determining the issue of credibility. Rather, the court improperly substituted its own review of the facts, choosing to place emphasis on factors which the district court, after hearing testimony and observing the witness' demeanor, determined were irrelevant. See Anderson v. City of

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[6] Prior Fourth Circuit precedent indicates a reliance on the clearly erroneous standard. See United States v. Bernard, 757 F.2d 1439 (4th Cir. 1985)(finding of exigent circumstances must be upheld unless clearly erroneous); United States v. Poole, 718 F.2d 671 (4th Cir. 1983)(finding of consent to search must be upheld unless clearly erroneous); United States v. Lewis, 528 F.2d 312 (4th Cir. 1975) (finding of voluntariness of confession must be upheld unless clearly erroneous).

Bessemer City, N.C., ____ U.S. ____, 105 S.Ct. 1504, 1511 (1985).

II. ASSUMING ARGUENDO THAT PROBABLE CAUSE DETERMINATIONS ARE A MIXED QUESTION OF LAW AND FACT SUBJECT TO A "DE NOVO" STANDARD OF REVIEW, THAT STANDARD OF REVIEW REQUIRES APPLICATION OF THE CLEARLY ERRONEOUS STANDARD OF REVIEW TO THE DISTRICT COURT'S FACTUAL FINDINGS.

This Court has yet to rule upon the proper standard of review which federal appellate courts should apply to a trial court's determination of the existence of probable cause. This Court's opinion in Ker v. State of California, 374 U.S. 37, 83 S.Ct. 1623 (1963), arguably supports a de novo review of such questions. Although, with regard to mixed questions of law and fact, the Court acknowledges "there is substantial authority in the Circuits on both sides of the question." Pullman-Standard, supra, 102 S.Ct. at 1790 n. 19.

Although probable cause determinations may be considered mixed questions of law and fact, and thus subject to independent review, the proper test under such review is whether "the rule of law as applied to the established facts is or is not violated." Id. The cavalier assertion by the Fourth Circuit that its view of the facts "compares favorably" with those of the other two decisions (Howard, supra and Pepple, supra) is neither a sufficient nor proper basis on which to find that the district court violated the established rule of law. Nor does the failure of the Fourth Circuit to enunciate preliminarily any standard of review disguise the improper and arbitrary factual review undertaken by the court, regardless of an earnest belief that it would have decided the case differently.

Even applying the de novo standard of review for determinations of probable cause, an appellate court is subject to explicit limitations. Among the limitations is that the court of appeals is required to show that the district court's factual determinations were clearly erroneous. Here, the court made no finding, but merely substituted its view of the facts for that of the district court. In Anderson, supra, 105 S.Ct. at 1511, this Court recognized that "appellate courts must keep in mind that 'their function is not to decide factual issues de novo'." Id. at 1512, quoting, Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123, 89

S.Ct. 1562, 1576 (1969).[7] The clearly erroneous standard "plainly does not entitle a reviewing court to reverse the factual findings of a trial court simply because it is convinced that it would have decided the case differently." Anderson, supra, 105. S.Ct. at 1513 (1985).

Where there are two permissible views of the evidence, the factfinder's view controls. That the appellate court takes a different view of the facts does not make the district's view clearly erroneous. Anderson, supra, 105 S.Ct. at 1512; United States v. Yellow Cab Co., 338 U.S. 338, 342, 70 S.Ct. 177, 179 (1949). The wisdom of Judge Murnaghan's

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[7] It is interesting to note that in Anderson the Court reverses a determination of the Fourth Circuit, holding that it misapprehended and misapplied the clearly erroneous standard.

comments in his dissenting opinion in United States v. Shears, 762 F.2d 397, 404 (4th Cir. 1985), is evident in this context: "when on shakes and turns a kaleidescope, one sees a very different arrangement, even though one is looking at the same things in combination." Here, there were obviously two views of the evidence: the district court's view and that of the appellate court. Based on the testimony of Agent Lee and the petitioner, the district court made a factual finding that there was no probable cause to arrest the petitioner. The district court was in a position to observe both DEA Agent Lee and the petitioner testify and was, therefore, able to evaluate their credibility. A review of the record reveals nothing to indicate clear error in any of the

district court's factual determinations. Contrary to the finding of the Fourth Circuit, the district court did consider all of the facts relied upon by the government,[8] in addition to the fact of the petitioner's presence with Mr. Welch. Having considered all of the facts, the district court made a factual determination that those other facts were not sufficient to establish probable cause to arrest the petitioner. If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse, even if it is convinced that it would have ruled differently had it been sitting as trier

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[8] The Fourth Circuit's opinion acknowledged that the District Court was aware of all of the facts which it relied upon to conclude that there was a probable cause to arrest. See page 10, supra.

of fact. See Anderson, supra, 105 S.Ct. at 1512. See also, United States v. Jabara, 644 F.2d 574, 577 (6th Cir. 1981)("The 'clearly erroneous' test does not derive solely from the trial judge's superior opportunity to assess the credibility of witnesses, it also reflects and preserves the proper relationship between the trial courts and the courts of appeal.")

Here, the Fourth Circuit engaged in nothing more than a duplication of the district court's efforts. Reminiscent of its improper review in Anderson, supra, the Fourth Circuit again "improperly conducted what amounted to a de novo weighing of the evidence in the records." Anderson, supra, 105 S.Ct. 1513, Here, the Fourth Circuit selected four factors, and concluded that those

factors "combine to justify defendant's arrest. Although each may also be susceptible of innocent explanations, that does not deny the validity of the assessment of them in aggregate to constitute probable cause." (App. B). The situation presented herein is not unlike the situation facing this Court in Pullman-Standard, supra, where the Court found that the court of appeals, in reversing the district court, "did not purport to be correcting a legal error, nor did it refer to or expressly apply the clearly erroneous standard." Pullman-Standard, supra, 456 U.S. at 282, 102 S.Ct. at 1787. When the record is examined in light of the appropriate deferential standard, the Fourth Circuit's contrary finding of probable cause to arrest is not justified.

The Fourth Circuit, if it was inclined to reverse the district court's factual findings (as was the case herein), was required to apply the clearly erroneous standard. It did not. In fact, it applied no standard whatsoever, in contravention of precedent of this Court and, therefore, the writ must be granted.

Respectfully submitted,

WILLIAM B. MOFFITT
LISA BONDAREFF KEMLER

WILLIAM B. MOFFITT &
ASSOCIATES
655 S. Washington St.
Alexandria, Va. 22314
(703) 684-7900
Counsel for Petitioner

By: Lisa Bondareff Kemler

CERTIFICATE OF SERVICE

I hereby certify that three true copies of the foregoing were mailed, postage prepaid, to the Solicitor General of the United States, Department of Justice, 10th & Constitution Aves., NW, Washington, D.C. 20530 and William Otis, Assistant United States Attorney, 1101 King Street, Suite 502, Alexandria, Virginia 22314 this 3rd day of June, 1988, in compliance with Rule 28.4(a) and 28.5(b) of the Rules of the Supreme Court.

Lisa Bondareff Kemler

LISA BONDAREFF KEMLER
(Member of the Bar of the Supreme Court)

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 87-5147

UNITED STATES OF AMERICA,

Plaintiff-Appellee

versus

RICHARD LEE COLZIE,

Defendant-Appellant

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan Jr., Chief District Judge. (CR-85-00180-A)

Submitted: February 26, 1988 - Decided April 6, 1988

Before WINTER, Chief Judge, CHAPMAN, Circuit Judge, and HAYNSWORTH, Senior Circuit Judge.

APPENDIX A

(William G. Otis, Assistant U.S. Attorney; Justin W. Williams, U.S. Attorney; Kenneth E. Melson, Assistant U.S. Attorney on brief) for Appellant; (William B. Moffitt; Thomas Rawles Jones, Jr.; Lisa Bondareff Kemler; Moffitt & Jones on brief) for Appellee.

PER CURIAM:

This matter is before the court for the third time, but since the issue presented has been already decided by us in this litigation, we grant the petition to rescind the briefing schedule and we affirm the present judgment on the district court for the reason set forth in United States v. Colzie, No. 85-5254, decided April 20, 1987.

The appellant was stopped at the Washington National Airport on September 4, 1985, after he had deplaned from a Miami flight. The appellant made a successful motion to suppress the

evidence taken at the time of the arrest. The government appealed and we remanded the case to the district court with instructions to make a finding of fact as to whether the appellant had consented to the search of his luggage. On November 25, 1986, the district court found that the appellant had not consented to the search of his luggage and there was not probable cause for appellant's arrest. The government appealed and in our opinion filed April 20, 1987 No. 85-5254 we concluded that there was probable cause for the arrest and that the cocaine found in appellant's baggage in the course of a search incident to the valid arrest was admissible in evidence.

On June 19, 1987, appellant was found guilty by the district court of possession with intent to distribute cocaine, and pursuant to an agreement with the government, the appellant reserved his right to appeal to the United States Supreme Court. The issue he wishes to present to the Supreme Court is the issue that was presented to us and decided by us in 85-5254.

Appellant has moved to rescind the normal briefing schedule and oral argument and has asked the court to affirm the conviction for the reasons expressed in our opinion in No. 85-5254.

The only issue presently presented is the same issue that we have already decided, and it would serve no useful purpose to have this point argued again.

It is therefore ordered that the motion to rescind the briefing schedule is granted and the appellant's conviction is affirmed because we find the search of the appellant was instant to a valid arrest for the reason set forth in our opinion in 85-5254.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 87-5254

UNITED STATES OF AMERICA,

Appellant,

versus

RICHARD LEE COLZIE,

Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan Jr., Chief District Judge. (CR-85-00180-A)

Submitted: December 17, 1986 - Decided April 20, 1987

Before WINTER, Chief Judge, CHAPMAN, Circuit Judge, and HAYNSWORTH, Senior Circuit Judge.

APPENDIX B

(William G. Otis, Assistant U.S. Attorney; Justin W. Williams, U.S. Attorney; Kenneth E. Melson, Assistant U.S. Attorney on brief) for Appellant; (William B. Moffitt; Thomas Rawles Jones, Jr.; Lisa Bondareff Kemler; Moffitt & Jones on brief) for Appellee.

PER CURIAM:

The government appeals from the order of the district court suppressing as evidence (a) cocaine found in defendant's luggage during a warrantless search after his arrest at Washington National Airport, and (b) a statement made by defendant after his arrest. The court rules that there was no probable cause to arrest; consequently, the warrantless discovery of cocaine was not incident to a valid arrest and the illegal arrest impermissibly tainted the ensuing statement. When we first heard the appeal, the government argued that there was probable cause for defendant's

arrest, and that, in any event, defendant had consented to the search. Because the district court had not made findings with respect to whether the search was consensual, we remanded the case to the district court for a finding of fact on this issue, without deciding the issue of probable cause.

On remand, the district court found that defendant did not consent to the search, and the government has advised us that it will not contest this finding. We must therefore now consider and decide the issue of probable cause. We conclude that the district court incorrectly decided that probable cause was lacking. We thus reverse and remand.

I.

In the Washington National Airport, an experienced DEA agent observed defendant, a black male, deplane from a flight from Miami at approximately 4 p.m. on September 4, 1985. Defendant carried no luggage and wore no socks. He conversed briefly with another man, a white male later identified as one Scandal, and departed.

Defendant was seen again the next day at 10:20 a.m. deplaning from another flight from Miami. He was soon joined by one Welch, a black male who had left the plane six to ten passengers behind defendant but had caught up with him at the terminal staircase. The two thereafter walked together through the terminal and eventually met up with Scandal, with whom defendant had conversed the previous day. The three

men were approached by two DEA officers who asked to speak with them. Defendant and Welch stopped to talk with the officers, but Scandal kept on.

The agents questioned Welch first. Welch said that he had come from Miami and, according to one of the agents, that his name was "William or something similar to that." He had previously produced a ticket issued in the name of "Johnson." Welch denied carrying cocaine but defendant did not respond to this inquiry by the agents. During the conversation, defendant became visibly nervous; Welch had already exhibited nervousness.

Welch apparently consented to a search of his hand luggage. In Welch's bag was found a box of Efferdent, and when the agent opened the box, he

recognized the white powder that it contained as cocaine. Welch was immediately arrested, and when defendant acknowledged that he and Welch were together, he too was arrested.

Meanwhile the other agent was searching defendant's bag. It contained a baby-powder bottle, but the bottle was not opened until a second search was conducted in the police office after Welch and defendant were arrested. When opened, it too was found to contain cocaine.

II.

Probable cause for an arrest exists when, "at the time the arrest occurs, the facts and circumstances within the officer's knowledge would warrant the belief of a prudent person that the arrestee had committed or was committing

an offense." United States v. Manbeck, 744 F.2d 360, 376 (4 Cir. 1984), cert. denied sub nom, O'Hare v. United States, 469 U.S. 1217 (1985). It is a practical assessment based on the totality of the circumstances, Illinois v. Gates, 462 U.S. 213 (1983); Manbeck, 744 F.2d at 376, and taking into account the expertise of law enforcement officials, United States v. Gooding, 695 F.2d 78, 82 (4 Cir. 1982) (trained officers can detect criminal conduct in behavior that may seem innocent to others); United States v. Howard, 758 F.2d 1318 (9 Cir. 1985).

It seems fairly clear that "mere presence" at the scene of a crime, or in the company of those engaged in crime, does not, by itself, establish probable cause for an arrest. See Hall, Search

and Seizure, Sec. 5:11 (1982); United States v. Di Re, 332 U.S. 581 (1948) (presence in car when counterfeit ration coupons were transferred, and where informant implicated only the other occupant of the car, not enough to justify arrest); Ybarra v. Illinois, 444 U.S. 85 (1979) (customer's presence in bar that was being searched pursuant to warrant not enough to justify search of customer). However, such presence is a legitimate factor to consider in determining the existence of probable cause. See Ringel, 2 Searches & Seizures, Arrests and Confessions, Sec. 23.3(a) (1986) ("presence combined with other factors may provide probable cause"); DiRe, 332 U.S. 581, 593-94 (argument from mere presence is "forceful enough in some circumstances," but not in

light of facts of this case); United States V. Swayne, 711 F.2d 467, 470 (8 Cir. 1983) ("the courts have recognized that in certain circumstances a person's choice of whom to associate with, as well as the nature of that association, must be taken into account when assessing probable cause"); Howard, 758 F.2d at 1320. The critical question then becomes: what circumstances, beyond the fact of presence, will be enough to constitute probable cause?

The district court considered that the only substantial fact bearing on the existence of probable cause was the mere presence of defendant, and association with Welch, when the guilt of Welch became certain. While the district court was aware of the other facts relied upon by the government to establish probable

cause, it did not think that they amounted to such a showing. We think otherwise. We comment on them and their legal significance seriatim.

(a) Colzie's two trips, within twenty-four hours, from Miami

Although it is possible to conceive of some legitimate business purpose for this itinerary, the government persuasively argues that suspicion was amply justified. See Swayne, 711 F.2d at 471 ("The point of [appellant's] departure and destination [also Maimi --known to be a major source of supply for illegal drugs], and most importantly the speed with which he intended to return, belies a belief that this was an innocent traveler").

(b) Scandal, the man who greeted Colzie on both occasions, did not stop when the agents approached and questioned Colzie and Welch.

While it is true that Scandal was under no obligation to stop, that does not deny the legitimacy of the officers' inference from his failure to do so. Such behavior is odd for someone greeting passengers at an airport. After cocaine was discovered on Welch (the forknowlege of which apparently explained Scandal's departure), the officers' awareness that Scandal had met Colzie at the airport the previous day understandably would have enhanced their suspicions.

(c) Colzie's "excessive" nervousness

Agent Lee described Colzie as "acting very, very nervous" --more so than normal when people are questioned by the

police. This is a legitimate consideration in an officer's assessment of probable cause. See Gooding, 695 F.2d at 84 ("may obviously be relevant" -- but not where the officers had conflicting perceptions of suspect's demeanor). While there is some merit in defendant's protest about the potential manipulation of a factor such as this, an experienced officer's unrefuted judgment that a suspect's anxiety exceeds that of most people who are questioned, is surely entitled to some weight.

(d) Colzie's admission, after discovery of Welch's cocaine, that he and Welch were traveling together

Unlike Di Re and Ybarra, supra, where there is no independent evidence of a connection between the defendant and the criminals in their presence, defendant

openly admitted that he was traveling with Welch. Defendant's argument, that his honesty should not have been grounds for suspicion, misses the point. What is significant is that it provided positive proof of a close connection--beyond mere coincidental presence--with a man carrying cocaine. Indeed, the Ninth Circuit, in recognizing that something more than mere presence is needed to establish probable cause, recently held: "One important consideration in assessing the significance of the association is whether the known criminal activity was contemporaneous with the association." United States v. Hillison, 733 F.2d 692, 697 (9 Cir. 1984). See also LaFave, Search and Seizure, Sec. 3.6 (1978) (short time span between the crime and the observed association with the

criminal reduces the need to show some special circumstances beyond the fact of association). In this case, defendant was not arrested for traveling with a man previously seen in possession of cocaine; Welch was carrying the contraband when he and defendant were arrested.

These four factors, we think, combine to justify defendant's arrest. Although each may also be susceptible of innocent explanations, that does not deny the validity of the assessment of them in aggregate to constitute probable cause. See Gates, 462 U.S. at 244, n.13 ("innocent behavior frequently will provide the basis for a showing of probable cause"). Nor do the instances of defendant's "innocent" behavior (e.g., choosing not to lie about his name and traveling companion) significantly

derogate from the aggregation of suspicious circumstances.

Although it is difficult, when engaging in probable cause analysis, to uncover bright lines or cases that are factually indistinguishable, the circumstances here compare favorably with those of other decisions finding probable cause with little more than mere presence. See, e.g., Howard, 758 F.2d 1320 (defendant waited in running car outside post office at the same time that woman tried to cash altered money order; conversed from car with man who exited from, and returned to, post office; shifted gears to leave as officer approached). United States v. Pepple, 707 F.2d 261 (6 Cir. 1983) (suspicious behavior in car in parking lot of motel where drug deal was being transacted).

Because we conclude that there was probable cause to arrest defendant, we think that both the cocaine found in his luggage in the course of a search indicent to a valid arrest, and his statement made after arrest, were admissible in evidence. The order suppressing their use must be reversed and the case remanded for trial.

REVERSED AND REMANDED.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 87-5254

UNITED STATES OF AMERICA,

Appellant,

versus

RICHARD LEE COLZIE,

Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan Jr., Chief District Judge. (CR-85-00180-A)

Submitted: October 10, 1986 - Decided November 14, 1986

Before WINTER, Chief Judge, CHAPMAN, Circuit Judge, and HAYNSWORTH, Senior Circuit Judge.

APPENDIX C

William G. Otis, Assistant U.S. Attorney; (Justin W. Williams, U.S. Attorney; Kenneth E. Melson, Assistant U.S. Attorney on brief) for Appellant; William B. Moffitt (Thomas Rawles Jones, Jr.; Lisa Bondareff Kemler; Moffitt & Jones on brief) for Appellee.

PER CURIAM:

This is an appeal by the United States from the district court's order suppressing the statements made by the defendant Richard Lee Colzie at the Washington National Airport on September 5, 1985, and also suppressing the evidence seized from his luggage at that time. The district court found that the arrest of Colzie was without probable cause and that the statements and the cocaine seized from his luggage were the fruits of this unlawful arrest. The district court did not rule on the government's claim that Colzie consented to the search of his luggage. At the

conclusion of the suppression hearing, the judge rules that the arrest was without probable cause, but stated, "I need further proof on the examination of the bag." Later the same day, without receiving any additional evidence on the question of the voluntariness of the luggage search, the district judge filed a written order suppressing both the defendant's statements and the cocaine taken from his luggage.

While the district court may have been correct in finding no probable cause for the arrest and suppressing the defendant's statements, if the defendant consented to the search of his luggage, the contraband found therein would have been admissible against him. Since this question remains open, we find it best to avoid a piecemeal appeal and remand the

case to the district court for a finding of fact on the issue of whether Colzie gave his consent to the search of his luggage.

REMANDED WITH INSTRUCTIONS.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 87-5254

UNITED STATES OF AMERICA,

Appellant,

versus

RICHARD LEE COLZIE,

Appellee.

On Petition for Rehearing with Suggestion for Rehearing In Banc.

O R D E R

Upon consideration of the appellee's motion to file late petition for rehearing with suggestion for rehearing in banc,

IT IS ORDERED that the motion is granted.

APPENDIX D

The appellee's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of the Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Chief Judge Winter, with the concurrence of Judge Chapman and Judge Haynsworth.

For the Court,

JOHN M. GREACEN
CLERK